



Homelessness and suitability

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Developments in affordability

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Affordability

Relevant to:

- a. whether someone is homeless in the first place (because they will be if it is not reasonable to continue to occupy unaffordable accommodation)
- b. whether someone may have made themselves intentionally homeless, and therefore not entitled to the full housing duty under Part VII of the Housing Act 1996
- c. whether accommodation offered to a homeless applicant is suitable
- d. development of ‘reasonable steps’ to prevent or relieve homelessness



Homelessness (Suitability of Accommodation) Order 1996/3204

- Article 2: matters to be taken into account
- Financial resources available, including but not limited to:
 - Salary, benefits, pension, child maintenance, savings and other capital
- Costs of accommodation, including but not limited to:
 - Rent, mortgage, service charge, council tax, mooring fees, deposit
- Payments which that person is required to make under a court order for the making of periodical payments to a spouse or a former spouse, or to, or for the benefit of, a child and payments of child support maintenance required to be made under the Child Support Act 1991
- Other reasonable living expenses



Homelessness Code of Guidance

- Homeless or threatened with homelessness
- Intentional homelessness
- Assessments and PHPs
- Suitability



Pre-Samuels cases

- *Birmingham City Council v Balog* [2013] EWCA Civ 1582
- *Huzrat v Hounslow LBC* [2013] EWCA Civ 1865
- *R (Farah) v Hillingdon LBC* [2014] EWCA Civ 359



Samuels v Birmingham City Council [2019] UKSC 28

- Single parent with four children, income solely from benefits
- Shortfall between Housing Benefit and rent, and also between totality of her income and her expenses
- Birmingham's review officer said 'I consider that it is a matter of normal household budgeting that you would manage your household finances in such a way to ensure that you were able to meet your rental obligation', and concluded that the accommodation had been affordable for Ms Samuels.



Samuels v Birmingham City Council [2019] UKSC 28

Supreme Court allowed her appeal:

- a. Assessment of what is reasonable requires an objective assessment; it cannot depend simply on the subjective view of the case officer;
- b. Affordability has to be judged on the basis that the accommodation is to be available ‘indefinitely’;
- c. Benefit levels are not generally designed to provide a surplus above subsistence needs for the family;
- d. The reviewing officer had therefore approached the issue wrongly. The question was not whether, faced with a shortfall, Ms Samuels could somehow manage her finances to bridge the gap; but rather, what were her reasonable living expenses (other than rent), that being determined having regard to both her needs and those of the children, including the promotion of their welfare.



Patel v Hackney [2021] EWCA Civ 897

- Mr Patel and his family were evicted from their private rented accommodation, following a possession order made due to rent arrears. After applying as homeless, Mr Patel was found to be intentionally homeless. It was decided that the property had been affordable.
- The review officer disregarded the expenditure submitted for white goods, stating that ‘I do not believe this to be an essential expense’ and that ‘I believe that there is sufficient flexibility in your weekly expenditure to cater for such eventualities.’
- On the reviewing officer’s calculations, the family’s income exceeded their expenditure by just over £3, and it was thus decided that the accommodation was affordable.



Patel v Hackney [2021] EWCA Civ 897

- Court of Appeal dismissed the appeal.
- It was held that, on the facts and evidence, a finding that there was ‘sufficient flexibility’ in the family budget was one that was open to the reviewing officer.
- Para. 13: ‘The statutory criterion of reasonable living expenses directs an enquiry into the needs of the particular applicant and his family and imposes an objective standard for determining whether any expenditure relied on to prove that the accommodation was unaffordable should be taken into account. Loss of accommodation through the non-payment of rent requires an explanation that must satisfy a test of reasonableness. This cannot be satisfied simply by reference to how the applicant has chosen to spend the money available to him at the relevant time. The statutory test requires the local housing authority to determine what in the particular case was a reasonable level of expenditure and the guidance in the Code suggests that this should be measured by what the applicant requires in order to provide as a minimum standard the basic essentials of life.’



Going forward

- Potentially some wider implications beyond Housing Act 1996 – e.g. asylum support or other contexts where financial circumstances are a consideration
- Importance of objective measures
- Means statements essential
- Actual income from benefits important - i.e. take into account deductions
- How long can a property be unaffordable for?



Obtaining relief in suitability challenges

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28 October 2021



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Introduction

- This part of the seminar is focussed on the duty to provide suitable accommodation, and recent developments in this area. Specifically, we will be discussing judicial review challenges to failures to provide suitable accommodation and the circumstances in which the High Court will make a mandatory order requiring requiring a local housing authority ('LHA') to provide suitable accommodation.
- We will cover:
 - The **legal principles** to be applied by the High Court in deciding whether to grant a mandatory order.
 - The **evidence** needed to support a successful application for a mandatory order.
 - **Procedural issues** that arise in urgent challenges.
- Aim is provide practical tips, to: (i) navigate (rather than resolve) legal difficulties; and (ii) deal with change in approach (by LHAs and Court) to such cases.



Legal principles – the nature of the main housing duty

- Section 206 Housing Act ('HA') 1996: functions under Pt 7 to be discharged by securing (or assisting/advising to secure) 'suitable' accommodation.
- Challenges to failures to provide suitable accommodation tend to arise in connection with the performance of the s193(2) main housing duty, often following a successful suitability review or appeal.
- The s193(2) duty to 'secure that accommodation is available for occupation by the applicant' is 'immediate, unqualified and non-deferrable' and 'if the duty is owed to an applicant, and the local housing authority fails to secure suitable accommodation for him, the authority will be in breach of its duty' (*R (Elkundi) v Birmingham City Council* [2021] EWHC 1024 (Admin), under appeal).
- Statutory scheme does not provide a 'reasonable time' to secure (alternative) accommodation (*R (M) v Newham LBC* [2020] EWHC 327 Admin). Get legal aid early?



Legal principles – the test for a mandatory order

- *Codona v Mid-Bedfordshire District Council* [2004] EWCA Civ 925 at [38] per Auld LJ ‘where it is shown that a local housing authority has been doing all that it could, the court would not make an order to force it to do the impossible’.
- *M* at [120] per Linden J: ‘Nor am I satisfied on the evidence that it is unreasonable to expect greater efforts or that it is impossible or unreasonably difficult to find suitable alternative accommodation...’.
- *Elkundi* at [321] per Steyn J: ‘The Council does not contend that it would be impossible to comply with a mandatory order... it would not be unreasonably difficult’. But (at [317]) ‘it does not follow that nothing less than impossibility will suffice’.
- *C.f. R (Imam) v Croydon LBC (No.2)* [2021] EWHC 739 (Admin) at [81(i)] per DHCJ Matthew Gullick QC: ‘the Claimant has not established that the conditions in which she is presently living are having an extremely serious effect on her, or that the situation is "intolerable" (per Lord Hope in *Ali*) or that "enough is enough" (per Lady Hale in *Ali*)’.



Legal principles – the application of the test

- A divergent approach? Former focusses on steps taken, or that could be taken, by LHA. Latter focusses on personal circumstances of applicant. Both the standard, and the burden, of proof have changed...
- How to deal with this divergence? In practical terms, when preparing a case, the solution may be to focus on the common ground which lies in the factors underpinning application of test.
 - the reasonableness of the LHA's position by reference to the steps and time taken (bearing in mind that the context is that the LHA are in breach of an unqualified duty);
 - the nature of the accommodation being occupied;



Legal principles – the application of the test

- the length of time the LHA had been in breach;
 - the efforts made by the LHA;
 - the likelihood of accommodation being made available in the near future;
 - the seriousness of the deficiencies at the property, in terms of their nature and effect;
 - any other particular factors in relation to the case.
- See *M* at [119]-[120] and *Elkundi* at [316]-[319], overlapping to a considerable degree with *Imam* at [81]-[82].



Evidence gathering

- The relevant factors on the previous slide dictate the evidence which needs to be gathered to maximise chances of obtaining mandatory relief.
- Evidence of impact on applicant likely to be significant. Mandatory relief refused in *Imam* where there was ‘no evidence... about the effect on the Claimant of the unsuitable conditions in which she is living beyond the terms of the letter from the Claimant's Solicitors of 23 April 2015... There is simply no evidence about the present effects on the Claimant's day-to-day life of the unsuitable features of the Property.’
- Could be combination of witness/medical/expert/social services (etc.) evidence. May simply bring up to date evidence presented during review, or bolster points not dealt with in review. New evidence will need to be presented to LHA prior to issuing any JR.
- A paper trail of requests to LHA for action and updates may highlight any intransigence, which is relevant to reasonableness of LHAs position.



Procedural issues relating to urgent applications

- Goal in suitability case may be to quickly obtain interim relief/expedition. Note the increasingly rigorous approach within Admin Ct: more stringent approach to urgent applications; more emphasis on involvement of Defendant in urgent decision making process; more robust approach to non-compliance. See in particular [Administrative Court Judicial Review Guide 2021](#) ('Admin Ct Guide') and [PD 54B](#).
- Admin Ct Guide at [2.1]: 'The appellate courts have identified an increasing concern about the need for appropriate procedural rigour in judicial review... If parties, or their legal representatives, fail to comply with the procedural requirements... the court has a range of sanctions at its disposal, including the powers:... to refer a legal representative to the relevant professional regulator'.
- Of relevance to solicitors as well as counsel. E.g. new approach will affect: evidence gathering; interactions with Defendant; whether further pre-action steps required; management of client expectations. And sanctions affect everyone.



Procedural issues - urgency

- How urgent is urgent? If case requires judicial consideration within 7-days then application for urgent consideration (N463) appropriate.
- But ‘It will very often be possible to point to a reason why the claimant’s interests would be better served if an application... were determined quickly. However this is not enough to justify using the court’s procedures for urgent consideration. Those procedures are made available **only** for urgent cases where there is a **genuine need** for the application to be considered urgently.’ See Admin Ct Guide at [17.2.1].
- Do you have/can you get evidence of ‘genuine need’? In this context, [17.2.2] refers to ‘irreparable consequences’. Evidence to justify urgency likely to be client/medical evidence of impact of property conditions (dealt with above). But taking into account that client may have been in unsuitable accommodation for prolonged period of time.



Procedural issues - urgency

- In gathering evidence to establish urgency think about:
 - Why the claim has not been issued earlier? The evidence may need to explain and justify any delay. E.g. repeated requests, over time, to persuade LHA to act.
 - Has something changed about the client's circumstances? E.g. loss of mobility.
 - Has a tipping point been reached? E.g. carer at breaking point.
 - Is it a process of attrition? E.g. mental health deteriorating day by day owing to lack of support network.
 - Or an ever present risk that has not materialised yet? E.g. risk of suicide/self-harm/ falling on stairs.
- This will overlap with the evidence you seek to underpin case for mandatory order.
- If no sufficient evidence of 'genuine need' then may still be appropriate to seek for claim to be expedited. But this should be done by N244 application with cover letter. See *Re an Application for Judicial Review* [2021] EWHC 1895 (Admin).



Procedural issues – involvement of Defendant

- PD 54B. Read in full, but of particular relevance here:
 - Serve N463 and invite representations on interim relief from Defendant prior to issuing of claim. See [1.7].
 - ‘Wherever possible the court will permit the defendant and any interested party the opportunity to make representations (either orally or in writing) before making any order on any urgent application.’ See [1.8].
 - ‘The applicant will be expected to have taken reasonable steps to investigate matters material to the application.’ See [2.2].
- ‘[A]ny points which could have been made in the [Defendant's] favour should have been on the [N463] form.’ See *R (DVP) v SSHD* [2021] EWHC 606 (Admin) at [73].
- Trend is to hear from Defendant prior to making any decision. Attempts to do this in pre-action correspondence (e.g. written requests for Defendant to justify its actions/ set out position on interim relief) will assist in persuading court to act more quickly.



Summary

- Obtaining mandatory relief in a suitability case raises some difficult legal issues. Watch out for *Elkundi* in the CoA. Keep in mind (possible) conflict between approach in *Imam* and *Elkundi & M.*
- But in practical terms, evidence of the ongoing impact on your client of being in unsuitable accommodation, coupled with a paper trail to establish the attempts you/the client have made to encourage the LHA to act (which will also serve to highlight any intransigence on part of LHA) will bolster chances of success.
- In gathering this evidence, and in communicating with LHA, think ahead to the possibility of making an urgent application to court. You will need to explain delay, justify the need for the Court to consider the matter urgently and be able to show that you have investigated reasons for the LHA's failure to act and given fair opportunity for the LHA to present its case in response.



Thank you

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